SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

EUGENE W. OSMENT, PETITIONER,

vs.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in *Eugene W. Osment, Respondent,* v. *Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants,* is reported in 159 S. W. (2d) 666.

II.

Statement as to Jurisdiction.

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

Argument in support of this Court's jurisdiction is made hereinafter.

III.

Statement of the Case.

The statement of the case appears in the petition and in Exhibit "A" of the petition. It is incorporated herein by reference.

IV.

Specificiations of Error.

The specifications of error are set forth on pages 28 and 29 of Exhibit "A" of the petition and are incorporated herein by reference.

V.

Argument.

This case involves an employee of an interstate carrier. The employee, your petitioner, was seriously injured, while engaged in his employment, as the result of the dangerous and rough horseplay of a fellow employee. This employee, one John Stalac, seized Osment, your petitioner, about the neck and squeezed him, choking off his air, until he became unconscious, then abruptly released him, and Osment fell to the ground fracturing his skull. A guard, employed by the company, and whose duties included the prevention of such horseplay, was standing nearby and observed the whole incident without taking steps to assist the petitioner or to stop Stalac from injuring the petitioner.

Action was brought by the petitioner against the respondents under the Federal Employers Liability Act (as amended, effective as of August 11, 1939, 53 Stat. 1404 (Title 45 U. S. C. A. Sec. 51, *et seq.*)), and a jury awarded

a verdict of Fifty Thousand ($50,000.00) Dollars in his favor, which was reduced on remitter to Thirty-Five Thousand ($35,000.00) Dollars and judgment entered thereon. This judgment was reversed outright on appeal by Division Two of the Missouri Supreme Court. A petition for a writ of certiorari to review this decision of Division Two of the Supreme Court of Missouri was filed in this Court on June 11, 1942, and denied on October 12, 1942, on the grounds that petitioner had not exhausted the appellate review provided by state law (Exhibit "A").

Those aspects of the case, which are concerned with the petitioner's rights under the Federal Employees Liability Act and the errors of Division Two of the Missouri Supreme Court in failing to hold according to the decisions of the United States Supreme Court, are fully discussed and argued in the brief submitted to this Court in support of the petitioner's first petition for a writ of certiorari in this case. This brief is attached to Exhibit "A" of our petition, and nine copies are being filed with the Clerk of this Court. In lieu of repeating and reprinting herein the entire brief submitted in support of the first petition, we incorporate it herein by reference and refer the Court to it for a full discussion of the facts and merits of the case as distinguished from the procedural aspects of the case. We shall then in this brief address ourselves only to the question of whether petitioner has exhausted the appellate review provided by the law of the State of Missouri, thus removing that defect of the case upon which this Court based its denial of the original petition for a writ of certiorari.

Article VI of the 1890 Amendments to the Missouri Constitution establishes two divisions of the Supreme Court of the State. Section 4 of this Article provides for the transfer of causes from these divisions to the Supreme Court

en banc. Section 4 is divided into two distinct parts, the first providing

> "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision;".

The second part of Section 4 provides

> "or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Thus, the first part of this Section 4 sets forth certain cases and circumstances pursuant to which the losing party has a *right upon application* to have the cause transferred to and heard by the Court *en banc,* while the second part gives the litigant no right but authorizes the Court in its discretion to transfer a case to the Court *en banc.*

The instant case did not involve any of the circumstances, nor was it the type of case which would give petitioner a right upon application to have the cause heard by the Court *en banc.*

McAllister v. *St. L. Mchts. Bridge & Ter. Ry. Co.,* 324 Mo. 1005, 25 S. W. (2) 791;

Riley v. *Wabash Ry. Co.,* 328 Mo. 910, 44 S. W. (2d) 136;

Huckleberry v. *Mo. Pac. Ry. Co.,* 324 Mo. 775, 26 S. W. (2) 980.

Then the petitioner's case could be reviewed by the Supreme Court of Missouri sitting *en banc* only if Division Two, in its discretion, exercised its authority under the

second part of Section 4 of Article VI of the Missouri Constitution and ordered the case transferred.[2]

Rule 24 of the Missouri Supreme Court provides that

> "A motion to transfer a cause under the provision of the Constitution from either division to Court *en banc* must be filed within ten days after the final disposition of the cause by the division * * *."

Under this rule any litigant with a case within the coverage of the first part of Section 4 would lose his right of review by the Court *en banc* if he fails to file a motion to transfer within the ten-day period provided for. But this ten-day period is a time limitation in which the litigant must exercise his right to have his cause transferred to the Court *en banc* and is not a limitation upon the time in which a division of the Court must exercise its discretion and authority to order the case transferred to the Court *en banc*. The constitution of the state places no such time limitation upon the divisions of the Court, nor does the language of Rule 24 purport to place any such limitation upon the divisions of the Court. Then a division of the Court can order a case transferred at any time so long as the case is within its jurisdiction.

Petitioner did not file a motion with Division Two to transfer the case to the Court *en banc* within this ten-day period provided for in Rule 24 because he had no right to have his case transferred by that Division, but could have a review by the court *en banc* only if the Division, in the

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[2] It should be noted that the Missouri procedure is not comparable to certiorari. The Divisions of the Court are not inferior courts. *State* v. *Duestrow*, 137 Mo. 44, 39 S. W. 266; *State* v. *Hamey*, 168 Mo. 167, 67 S. W. 620; *Scheuffer* v. *Mfg. Lumbermen's Underwriters*, 163 S. W. (2) 750; and it is the divisions, not the Court *en banc*, which have the authority to have a case transferred and reviewed by the Court *en banc*. (Article VI, Sec. 4, Mo. Constitution.)

exercise of its authority, ordered the case transferred. But by failing to file a motion with Division Two to transfer the case to the Court *en banc* within the ten-day period the petitioner lost no *right* to have the case reviewed by the Court *en banc* for he never had a right to such review. The only possible purpose or effect of such a motion would be to encourage the court to exercise its discretion in regard to the question of whether nor not to order the case transferred. Since the laws of Missouri and Rules of its courts impose no limitation of time in which a Division of the Court may exercise its authority and order a case transferred, should it in its discretion decide to do so, it is immaterial whether such a motion was filed within the ten-day limitation provided by Rule 24 of the Missouri Supreme Court or after the ten days had expired, for it could only influence the Court to exercise its discretion and dispose of the question of the possibility of the losing litigant obtaining a further review of his case by the Court *en banc.*

After this Court denied his petition for writ of certiorari on the grounds that appellate review provided for by state law had not been exhausted, the petitioner filed a motion with the Missouri Court (R. 569) requesting it to exercise its discretion and thus dispose of the question of appellate review by the state courts. By entering an order permitting this motion to be filed (R. 569) and by entertaining this motion, the Court demonstrated that it had retained jurisdiction over this case and that the case could receive further review should Division Two, in the exercise of its discretion, order the case transferred to the Court *en banc.* It is interesting to note that the Chief Justice who signed the order permitting the motion to transfer to be filed is a member of Division Two of the Court.

After the Court had accepted petitioner's motion to transfer the case, the respondents filed a motion to strike petitioner's motion (R. 574). The motion to strike was granted (R. 588).

Thus, pursuant to the Decision of this Honorable Court of October 12, 1942, denying petitioner's original petition for a writ of certiorari (R. 578), petitioner proceeded to have all appellate review provided by the laws of Missouri exhausted. Division Two of the Missouri Court, by refusing to grant petitioner's motion to transfer the case to the Court *en banc*, declined to exercise its discretion to order the cause transferred to the Court *en banc*, and only by Division Two ordering the case transferred, in the exercise of its discretion, could there have been any further appellate review of the case under the laws of Missouri. And so now all possible appellate review of this case under the laws of Missouri has been exhausted.

Conclusion.

It is respectfully submitted that appellate review provided for under the laws of the State of Missouri has been exhausted, that the holding of Division Two of the Supreme Court of Missouri is contrary to the construction given the Federal Employees Liability Act by this Court, and that the holding of Division Two of the Supreme Court of Missouri should be reversed.

WHEREFORE, petitioner respectfully urges that this Court grant a writ of certiorari to the Supreme Court of Missouri and review and reverse the holding and decision of that court.

Respectfully submitted,

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